Supreme Court, U.S.
FILED
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No. _____

In the Supreme Court of the United States

JOHN C. THORSTAD,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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41pp+FB

QUESTION PRESENTED

May a state empower police to routinely require warrantless blood draws of arrested drunk drivers when the state has a statutory scheme of breath testing that yields presumptively accurate and admissible evidence of intoxication?

PARTIES TO THE PROCEEDINGS

The petitioner is John C. Thorstad; petitioner to this Court and defendant in the state court proceedings. Mr. Thorstad is an individual without corporate affiliation.

The respondent is the State of Wisconsin; respondent in this Court and the plaintiff in the state court proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the Wisconsin Supreme Court entered in *State of Wisconsin v. John C. Thorstad*, appeal no. 99-1765-CR, on October 18, 2000, denying review of the opinion of the Wisconsin Court of Appeals, District IV in that appeal, which decision reversed the order of the circuit court for Richland County in *State of Wisconsin v. Thorstad*, case number 97 CT 63, suppressing blood samples drawn from petitioner without a warrant for use as evidence at trial.

OPINIONS BELOW

The order denying review issued by the Wisconsin Supreme Court in *State v. of Wisconsin v. John C. Thorstad*, appeal no. 99-1765-CR, is not published and is reproduced in App. A at 1a-2a. The opinion of the Wisconsin Court of Appeals in *State v. John C. Thorstad*, appeal no. 99-1765-CR, is reported at 2000 WL 1160695 (Ct. App. 2000) and is reproduced in App. B at 3a-12a.

JURISDICTION

The date on which the highest state court decided this case was October 18, 2000. A copy of that order appears in the Appendix to this Petition (App. 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin statute section 343.305(2), (3), and (4):

> Wis. Stat. section 343.305(2) Implied Consent. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas

enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a) or (am), and may designate which of the tests shall be administered first.

Wis. Stat. section 343.305(3) Requested or Required. (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63(2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

(am) Prior to arrest, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2) whenever a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person is violation or has violated s. 346.63(7). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. For the purposes of this paragraph, "law enforcement officer" includes inspectors in the performance of duties under s. 110.07(3).

(b) A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or detects any presence of alcohol, controlled substance, controlled substance analog or other drug or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated s. 346.63(7), one or more samples

specified in par. (a) or (am) may be administered to the person.

(c) This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means.

Wis. Stat. section 343.305(4) Information At the time a chemical test specimen is requested under sub. (3) (a) or (am), the person shall be orally informed by the law enforcement officer that:

(a) He or she is deemed to have consented to tests under sub. (2);

(b) If testing is refused, a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior suspensions, revocations or convictions within a 10-year period that would be counted under s. 343.307(1) and the person's operating privilege would be revoked under this section;

(c) If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration and was driving or operating a motor vehicle, the person will be subject to penalties, the person's operating privilege will be suspended under this section and a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior

convictions, suspensions or revocations within a 10-year period that would be counted under s. 343.307(1); and

(d) After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.

STATEMENT OF THE CASE

Petitioner, JOHN C. THORSTAD, was arrested by deputies in Richland County, Wisconsin, for drunk driving after he went off a highway and rolled over the Chevrolet Tahoe he'd been driving. He was not injured. Nevertheless, he was taken by police to a local hospital, where the officers read to him an "Informing the Accused form." This form, required by Wisconsin statute, tells a driver arrested for drunk driving that the law requires him to submit to a blood draw or breath test, and that a refusal to submit will be punished by revocation of the person's driving privileges.

The statute in question is Wisconsin's "implied consent law," Wis. Stat. sec. 343.305. The "implied consent law" states that a person who drives a vehicle on Wisconsin's highways is deemed to have consented to a blood or breath test if arrested for drunk driving. It sets penalties for refusing, including revocation of the person's privilege to drive in Wisconsin. It applies, according to its terms, merely because the person drives on a Wisconsin road.

The Petitioner submitted to the blood draw. The blood was drawn approximately an hour and a half after his arrest.

In court, Petitioner moved to suppress the blood test results. He argued that the taking of the blood sample was

"unreasonable" and violated the Warrant Clause of the Fourth Amendment because the police could have performed a breath test instead, a breath test which could have been performed at least as quickly after the accident as the blood draw and which would have enjoyed, under Wisconsin law, exactly the same streamlined admissibility, presumptive accuracy, and evidentiary weight as the results of a blood test.

Wisconsin law, through statute and case law, has established that both breath and blood tests are presumed accurate when conducted in the manner specified by statute, and that the test results are admissible as a matter of law. Such test results, whether of breath or blood, also equally serve as a basis for presuming intoxication if the results are at or above specified levels.[1]

The trial court agreed, and suppressed the blood test results.

The trial court held that seizing blood from an arrested driver violated the Fourth Amendment prohibition against "unreasonable" searches and seizure and violated the Warrant Clause when police could have secured a breath test of equal evidentiary value and admissibility in no greater time than required to secure the blood samples. The trial court further ruled that the statutorily "implied" consent could not serve as a Constitutional substitute for a judicially issued warrant, because such consent is not the true voluntary consent required by the Fourth Amendment.

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[1] The level which is defined as "prohibited" under Wisconsin law is the same for breath or blood and depends on the number, if any, of prior drunk driving convictions. In this case, that level would have been 0.10 BAC.

The trial court specifically held that seizing blood from the Petitioner could not be justified under the "exigent circumstances" exception to the warrant requirement. Reasoning, consistently with recent decisions of this Court such as *Richards v. Wisconsin*, 520 U.S. 385 (1997), that the existence of exigency must be determined in the "totality of the circumstances," the trial court concluded that the availability of breath testing was a factor which a court was required to consider in determining whether drawing of a blood sample from an arrested driver without a warrant was Constitutionally reasonable, and whether such action was required by "exigency."

The State appealed to the Wisconsin Court of Appeals. That court reversed the trial court, in an opinion that was published as precedent. It concluded that the earlier decision of the Wisconsin Supreme Court in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), held that blood can be drawn from anyone arrested for drunk driving and that the fact of arrest alone constitutes "exigent circumstances" regardless of any other facts then existing. As an intermediate appellate court, the Court of Appeals concluded it could not deviate from the *Bohling* precedent, so construed.[2]

The Wisconsin Supreme Court denied review of the opinion of the Court of Appeals.

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[2] In fact, the *Bohling* opinion need not have been so dogmatically construed. In *Bohling* the driver had first been offered a breath test, which he had refused. It was only then that police elected to seek a blood sample. Hence, the availability of breath testing was not one of the "totality of the circumstances" bearing on exigency in *Bohling*, as the driver himself had made a breath test unavailable by refusing it.

REASONS FOR GRANTING THE WRIT

This Court's decision in *Schmerber v. California*, 384 U.S. 757 (1963), has been overtaken by time, science, and technology. It is a decision which is obsolete in both factual and legal predicates, and which should be revisited.

Wisconsin's Supreme Court, like many courts, has construed the *Schmerber* decision as a blanket, *per se*, authority for drawing blood from one arrested for drunk driving on the theory that an "exigency" exists justifying that intrusion into the body based on one and only one fact - the arrest itself - to the exclusion of all others bearing on the issue. That interpretation, one not entirely consistent with the facts of *Schmerber* but certainly understandable in light of some of that opinion's language, is not a reasonable one today.

This Court's decisions in *Richards v. Wisconsin*, 520 U.S. 385 (1997), and *Wilson v. Arkansas*, 514 U.S. 927 (1995), have rejected finding "exigency" *per se* from the nature of an offense, and have clearly held that the existence of "exigency" justifying a warrantless seizure is always a case-by-case decision to be made on the "totality of the circumstances" bearing on the issue.

This is the law which the trial court applied, which the Wisconsin Court of Appeals ignored, and which has overtaken the interpretation of *Schmerber* articulated by the Wisconsin Supreme Court in *Bohling*.

Moreover, science and technology have eroded the implicit predicate of *Schmerber*. The Ninth Circuit has recognized that blood testing, in the era of AIDS and other blood borne pathogens, is no longer the routine and riskless

process it was thought to be in 1963. *Nelson v. City of Irvine, California*, 143 F.3d 1196 (9th Cir. 1998). Concomitantly, states, including Wisconsin, have developed advanced and scientific breath testing programs, adopting statutes, such as those charged in the present case, which define intoxicated driving offenses in terms of the standard used to test the person, whether it be breath or blood. Hence, the technology of breath testing, a type of testing crude in both science and application in 1963, is now reliable, presumptively accurate and, as in Wisconsin, placed as a matter of statute law on an equal footing in every legal respect with blood testing.

As a consequence, the status, both legally and scientifically, of breath testing, its routine availability for law enforcement use, and its conclusive legal effect in court in proof of intoxication are factors which must be weighed, under the Fourth Amendment, both in determining whether the warrantless seizure of blood from an arrested driver is constitutionally reasonable and whether there is an "exigency" which requires a warrantless seizure of blood to ensure that the State will not be deprived of evidence of the driver's intoxication.

The position of the Wisconsin courts and their interpretation of this Court's decision in *Schmerber* have been rejected by at least one federal appellate court. In *Nelson*, the Ninth Circuit held that the availability of breath testing, under a statutory scheme which, like Wisconsin's, accorded breath test results a legal and evidentiary effect identical to that of blood tests, was a factor to be considered in the constitutionally required balancing mandated to determine whether police truly were required to proceed without a warrant or forego obtaining scientific evidence of a driver's intoxication. In so holding, as did the trial court in the present case, the Ninth Circuit did no more than apply the

basic predicate upon which this Court has consistently held any determination of exigency must be made: a case-by-case evaluation of the "totality of the circumstances."

The Fourth Amendment contains no exception for drunk driving cases. This Court has rejected *per se* exigency based on the character of an offense to the exclusion of all other relevant circumstances. Yet, this Court's decision in *Schmerber* - one decided in a different age and based on vastly different law enforcement capabilities than presently exist under current laws - continues to be offered up as justification for nullifying the impact of this Court's current precedent.

CONCLUSION

What made sense when breath testing was in its infancy and States had few tools allowing accurate determination of alcohol concentrations doesn't make sense today. The needs of law enforcement for proof of intoxication have been addressed in states, like Wisconsin, which have created legal structures presuming the accuracy of breath test results and by technological advancements that have made such presumptions scientifically indisputable. When *Schmerber* was decided in 1963, law enforcement often had to choose between drawing a blood sample or foregoing scientifically valid evidence of intoxication. Those no longer are the only choices. State laws, including those of Wisconsin, have created testing schemes validating breath testing and requiring those arrested to submit.

Under the Fourth Amendment, most states can be free to require that those legal and scientific capabilities be ignored in determining whether circumstances are so "exigent" that police are allowed to dispense with the requirement of a judicially issued warrant which is one of the most fundamental bulwarks of individual liberty incorporated into the Bill of Rights.

Respectfully submitted,

/s/_____

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APPENDIX A

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[Filed: Oct. 18, 2000]

To: October 17, 2000

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You are hereby notified that the Court has entered the following order:

No. 99-1765-CR State v. Thorstad L.C. #97CT63

A petition for review pursuant to Wis. Stat § 808.10 having been filed on behalf of defendant-respondent-petitioner, John C. Thorstad, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX B

COURT OF APPEALS DECISION
DATED AND FILED

[Filed: August 17, 2000]

No. 99-1765-CR

STATE OF WISCONSIN, *Plaintiff-Appellant*,	)
v.	)
JOHN C. THORSTAD, *Defendant-Respondent*.	)

APPEAL from an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 DYKMAN, P.J. The State appeals from an order granting John Thorstad's motion to suppress a warrantless blood test performed to obtain evidence of Thorstad's intoxication. The State contends that the blood test was admissible because Thorstad consented to the blood test, or in the alternative, because the blood test was justified under *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993).

Thorstad argues that the blood test was properly suppressed because it was coerced and nonconsensual, and therefore, an unreasonable search in violation of the Fourth Amendment. We conclude that the test was admissible because it met the constitutional requirements for warrantless blood tests set out in *Bohling*, 173 Wis. 2d at 533-34. We therefore reverse.

I. Background

¶2 The parties stipulated to facts set forth in both the May 12, 1999 motion hearing and Thorstad's amended motion to suppress. The trial court decision relied on additional facts the parties do not contest. Thorstad was arrested on September 27, 1997, at the scene of a one-car accident.[1] His arrest followed his admission that he was the driver of the car and that he had been drinking a lot. He had also failed two field sobriety tests. Upon arrest, he was taken to Richland Hospital for a blood test. The arresting officer did not obtain a warrant for the blood test. Instead, the officer requested that Thorstad provide a blood sample for evidentiary analysis and read Thorstad an "Informing the Accused" form. The information on this form approximated the language mandated by WIS. STAT. § 343.305(4) (1997-98).[2] Among other things, the form explained that Thorstad

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[1] The trial court's decision gives the date of arrest as September 27, while Thorstad's amended motion to suppress gives the date as September 28; however, the discrepancy is not relevant to our decision.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. The language of WIS. STAT. § 343.305(4) has been modified since Thorstad's arrest. However,

could refuse to submit to chemical testing, but that upon such refusal, his driving privileges would be revoked. After the officer read the form, Thorstad agreed to the blood test. At no time did Thorstad request that he be given the opportunity for an alternate form of test, nor did he ever refuse to take the blood test.

¶3 On October 20, 1997, the State filed a complaint against Thorstad, alleging one count each of operation of a motor vehicle while under the influence of an intoxicant and operation of a motor vehicle with a prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(a) and (b).[3] Thorstad moved to suppress blood test evidence of his intoxication, and later amended his motion. In his amended motion, Thorstad argued that the blood test was an unreasonable search in violation of the Fourth Amendment. The trial court concluded that the State had failed to meet its burden to justify the warrantless blood test and ordered the blood test suppressed. The State appeals.

II. Analysis

¶4 Whether a search is reasonable is a question of constitutional law that we review de novo. *See State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992). The

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the substance of the information that § 343.305(4) requires in the Informing the Accused form has not changed. Furthermore, the language change in the statute since Thorstad's arrest does not affect our analysis.

[3] The state filed an amended complaint on May 4, 1998. However, no additional counts were alleged.

use of warrantless blood tests to detect evidence of intoxication in motorists suspected of drunk driving-related offenses has been held to be constitutionally permissible at least since the United States Supreme Court's decision in *Breithaupt v. Abram,* 352 U.S. 432 (1957). In *Breithaupt,* the Court affirmed a defendant's conviction over his objection that blood test evidence taken from him while unconscious was an unreasonable search and seizure under the Fourth Amendment. *Id.* at 434, 440.

¶5 Recognizing that "intrusions beyond the body's surface" implicated "interests in human dignity and privacy which the Fourth Amendment protects," the Supreme Court elaborated on the conditions under which blood tests were constitutionally permissible. *Schmerber v. California,* 384 U.S. 757, 769-70 (1966). There, the Court held that the Fourth Amendment permitted a warrantless blood test after a lawful arrest. *Id.* at 759, 771. However, the Court qualified its holding by noting several conditions and circumstances underlying its conclusion. *See id.* at 770-72. First, given the facts of the case, there was a "clear indication" that evidence of intoxication would be found in the defendant's blood. *Id.* at 770. Second, the blood test was taken in a "reasonable manner" because it was taken "by a physician in a hospital environment according to accepted medical practices." *Id.* at 771. Third, because the human body rapidly eliminates alcohol from the system, "the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Id.* at 770. Finally, the Court noted that the defendant was not someone with a particular health or religious objection. *See id.* at 771. Therefore, a blood test was a reasonable means to measure intoxication: "[F]or most

people the procedure involves virtually no risk, trauma, or pain." *Id.*

¶6 Relying on *Schmerber,* in *Bohling,* the Wisconsin Supreme Court held that given certain limitations, "a warrantless blood sample taken at the direction of a law enforcement officer is permissible." *Bohling,* 173 Wis. 2d at 533-34. The *Bohling* court specifically noted that it read *Schmerber* to permit warrantless blood tests because the rapid dissipation of alcohol from the bloodstream constitutes exigent circumstances. *Id.* at 539-40. The presence of exigent circumstances is an exception to the Fourth Amendment's requirement that law enforcement authorities obtain a warrant to conduct a search. *See New York v. Quarles*, 467 U.S. 649, 653 n.3 (1984); *State v. Kiekhefer,* 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997).

¶7 In outlining the requirements that must be met before a warrantless blood draw is permissible under the Fourth Amendment, the *Bohling* court examined the analysis in *Schmerber. Bohling,* 173 Wis. 2d at 537-41. The court concluded that warrantless blood draws are permissible when the following four requirements are met:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Id. at 533-34 (footnote omitted).[4]

¶8 The State argues that taking Thorstad's blood without a warrant was justified because the four requirements of *Bohling* were met. The State also contends that, regardless of *Bohling,* Thorstad consented to the blood test under WIS. STAT. § 343.305. In *County of Ozaukee v. Quelle,* 198 Wis. 2d 269, 277-78, 542 N.W.2d 196 (Ct. App. 1995), we summarized § 343.305:

> Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. A person may revoke consent, however, by simply refusing to take the test. Thus, a driver has a "right" not to take the chemical test (although there are certain risks and consequences inherent in this choice). The legislature recognized that drivers being asked to take a chemical test should be informed of this choice and therefore requires law enforcement officers to provide drivers with certain information.

(Citations omitted.)

¶9 Thorstad does not contend that the law enforcement officer failed to provide the information

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[4] The court also noted that probable cause to arrest could substitute for an actual lawful arrest in requirement (1). *See Bohling*, 173 Wis. 2d at 534 n.1 (citing *State v. Bentley*, 92 Wis. 2d 860, 863-64, 286 N.W.2d 153 (Ct. App. 1979)).

mandated by WIS. STAT. § 343.305; nevertheless, he argues that the blood test was an unreasonable search under the Fourth Amendment. In support of his position, Thorstad relies heavily on a Ninth Circuit Court of Appeals case, *Nelson v. City of Irvine,* 143 F.3d 1196 (9th Cir. 1998), *cert. denied,* 525 U.S. 981 (1998). In *Nelson,* the Ninth Circuit held that "[w]hen an arrestee requests but is denied the choice of an available breath or urine test, the exigency used to justify the warrantless blood test continues only because of the ... failure to perform the requested alternative test." *Id.* at 1205. Therefore, "blood tests [become] not only unnecessary and unreasonable, but violate[] the Fourth Amendment's warrant requirement." *Id.* However, *Nelson* was a class action where the Ninth Circuit limited the plaintiff class to those who had requested or consented to a breath or urine test instead of a blood test. *See id.* at 1203 & n.3. Thorstad did not request either alternate test. Furthermore, *Nelson* is not binding in Wisconsin. To the extent, if any, that *Nelson* is in conflict with the exigent circumstances analysis of *Bohling* and *Schmerber,* it is not for this court to resolve that conflict. *See Cook v. Cook,* 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶10 Thorstad also argues that the blood test was an unreasonable search because it was involuntary and nonconsensual. However, *Bohling* does not require that the subject of the blood test give consent or voluntarily take the test, 173 Wis. 2d at 534-35, nor does *Bohling* thus depend on whether the subject of the blood test was deemed to have consented under WIS. STAT. § 343.305. Therefore, Thorstad's contention that his blood test was an unreasonable search must ultimately rest on one of the following premises:

(1) the requirements of *Bohling* were not met; (2) § 343.305 is unconstitutional; or, (3)Bohling is unconstitutional.[5]

¶11 Even if it were clear from Thorstad's brief that he is arguing that *Bohling* is unconstitutional, we could not reach that question. This court cannot alter or overrule the constitutional standard set by *Bohling*. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook*, 208 Wis. 2d at 189. Neither do we begin our analysis by addressing the constitutionality of WIS. STAT. § 343.305. "As a matter of judicial prudence, a court should not decide the constitutionality of a statute unless it is essential to the determination of the case before it." *Maguire v. Journal Sentinel, Inc.*, 2000 WI App 4, ¶31, 232 Wis. 2d 236, 605 N.W.2d 881, review denied, __ Wis. 2d __, 612 N.W.2d 732 (Wis. April 28, 2000) (No. 973675), (quoting *Kollasch v. Adamany*, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981)). Instead, our first task is to determine whether the requirements of *Bohling* were met under the circumstances of this case. If the *Bohling* requirements were met, our inquiry need go no further.

¶12 To justify a warrantless blood draw, *Bohling* first requires that "the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-

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[5] Thorstad has served the attorney general with a copy of his amended motion to suppress We have previously concluded that notice to the attorney general is a prerequisite to a party's constitutional challenge to a statute. *See Midwest Mut Ins Co. v. Nicolazzi*, 138 Wis. 2d 192, 202,405 N.W.2d 732 (Ct. App. 1987).

driving related violation or crime." 173 Wis. 2d at 534. When Thorstad's blood was taken, he had already been arrested. Thorstad does not claim that his blood was taken or used for any purpose other than to obtain evidence of intoxication. Therefore, the first requirement is met.

¶13 *Bohling* next requires that there be "a clear indication that the blood draw will produce evidence of intoxication." *Id.* The supreme court has held that, in the context of a blood draw incident to arrest, "clear indication" is the legal equivalent of"reasonable suspicion." *State v. Seibel,* 163 Wis. 2d 164, 179, 471 N.W.2d 226 (1991). Reasonable suspicion is "less than probable cause, but more than a hunch." *State v. Guy,* 172 Wis. 2d 86, 95, 492 N.W.2d 311 (1992) (citing *Terry v. Ohio,* 392 U.S. 1, 22 (1968)). The question of what constitutes reasonable suspicion is a common sense test, where the court considers all the facts and circumstances. *See State v. Jackson,* 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶14 At the time Thorstad's blood was drawn, he had been found at the scene of a one-car accident. He had admitted he had been driving and had been drinking a lot. He had also failed two field sobriety tests. The combination of these circumstances constitutes at least a reasonable suspicion that a blood test would reveal evidence of intoxication.

¶15 *Bohling* also requires that when a blood sample is taken, "the method used to take the blood sample is a reasonable one and performed in a reasonable manner." 173 Wis. 2d at 534. In both *Bohling and Schmerber,* the defendant was taken to a hospital for the blood test. *See Schmerber,* 384 U.S. at 758-59; *Bohling,* 173 Wis. 2d at 535. Both the

Bohling court and the *Schmerber* Court concluded that the blood test was reasonable under the Fourth Amendment. *Schmerber*, 384 U.S. at 772; *Bohling*, 173 Wis. 2d at 536. Like the defendants in *Schmerber* and *Bohling*, Thorstad's blood test was performed in a medical environment and was therefore done by a reasonable method and in a reasonable manner.

¶16 Finally, *Bohling* requires that "the arrestee presents no reasonable objection to the blood draw." 173 Wis. 2d at 534. We need not delineate what sorts of objections might be considered reasonable objections because Thorstad did not present *any* objections, reasonable or otherwise. He did not refuse to take the test, nor does the record reveal that he gave any indication that he would prefer another test.

¶17 Because the requirements of *Bohling* were satisfied, we conclude that Thorstad's blood test was a reasonable search under the Fourth Amendment. Because the search was constitutionally permissible, the trial court erred in granting Thorstad's amended motion to suppress. We therefore reverse and remand for further proceedings.

By the Court.— Order reversed and cause remanded with directions.

Recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT
RICHLAND COUNTY

[Filed: May 17, 1999]

STATE OF WISCONSIN, *Plaintiff*,	)	MEMORANDUM DECISION
v.	)	Case No. 97 CT 63
JOHN C. THORSTAD, *Defendant*.	)	

In this case, the amended complaint charges the defendant with companion counts of second offense operating a motor vehicle under the influence of an intoxicant, contrary to section 346.63(1) (a), Wisconsin Statutes, and operating with a prohibited alcohol concentration, contrary to section 346.63(1) (b), Wis. Stats. The defendant has moved to suppress the blood alcohol evidence on the grounds that the blood sample was taken in violation of the defendant's Fourth Amendment rights to be free of unreasonable searches and seizures. The parties stipulated to facts for the purpose of the amended suppression motion at a hearing held on August 6, 1998, and briefs have been filed.

The defendant previously filed a motion to urging noncompliance with the Implied Consent law, section 343.305, Wis. Stats., as a basis for suppression of the blood evidence. However, this issue was not briefed by the parties, and in light of the defendant having amended its suppression motion to assert the Fourth Amendment issue, this Memorandum Decision does not reach the issues raised by the original Implied Consent motion, which is deemed to have been withdrawn.

Upon review of the stipulated facts, and having read and considered the legal arguments made in support of and in opposition to the defendant's Fourth Amendment suppression motion, the court concludes that the motion should be granted for the reasons set forth below.

For purposes of resolving the suppression motion, the facts are taken to be that John C. Thorstad was arrested on September 27, 1997, at the scene of a one-car accident following his admission that he was the driver and that he had been drinking a lot, and following his failing performance on two field sobriety tests. He was transported to the Richland Hospital where he was issued a citation for operating under the influence and read the Informing the Accused form.

Mr. Thorstad then submitted to a test of his blood, and a sample was taken by hospital personnel. Although no test result had yet been obtained, the arresting officer issued the defendant a Notice of Intent to Suspend Operating Privilege Temporary Driving Permit. Eventually the test was conducted by the state hygiene lab and reported as .153g/100 ml blood ethanol concentration.

Other stipulated facts are set forth in the defendant's Amended Motion to Suppress. See transcript of the August 6, 1998, motion hearing, pages 2-4. Certain of these additional facts will be referred to later in this decision.

The issue to be resolved by this court is whether requiring a blood draw in this case when a breath testing machine was available was reasonable under the Fourth Amendment in the absence of a warrant. For the reasons argued by the defense in its Reply Brief, this is not a consent search under the Fourth Amendment even though Mr. Thorstad submitted to the blood draw without resistance. See stipulated facts set out in paragraphs 1 through 3 of the amended suppression motion. The court cannot determine from this record that the defendant's "consent" was voluntary under the Fourth Amendment, and therefore the blood draw cannot be justified constitutionally as a consent search, even if accomplished pursuant to section 343.305, Wis. Stats.

Further, this is not a case in which the breath testing machine was unavailable for some reason. Paragraph 4 of the amended motion. Nor is it a case in which the defendant refused or resisted a breath test. Either circumstance might well alone have made the blood draw reasonable, and thus permissible constitutionally.

Nothing in this record indicates why blood was drawn in this case rather than a breath test being conducted. One must assume that the state simply preferred blood test evidence for some unstated reason, either as a matter of policy, or having to do with this particular case, and felt that it was free to designate blood as the test it would require

under the Implied Consent law. However, the record is silent on this point.

The defendant's opening brief correctly sets forth the applicable Fourth Amendment authorities that establish the warrant requirement generally, and that warrantless searches and seizures must fit within narrowly defined exceptions to be upheld as reasonable.

Warrantless blood draws have been upheld as reasonable under the "exigent circumstances" exception on the grounds that blood alcohol rapidly dissipates with the passage of time. Schmerber v. California, 384 U.S. 757 (1966); State v. Bohling, 173 Wis. 2d 529 (1993). However, the precise legal issue before this court for decision was not addressed in either of these cases, nor in any other reported (or unpublished) Wisconsin appellate court opinion. The Implied Consent law, being a statutory enactment of the legislature, does not help resolve the constitutional question.

The defendant, citing Nelson v. City of Irvine, 143 F.3d 1196 (9th Cir. 1998), argues that since a less intrusive means of obtaining legally equivalent chemical evidence was available to the State, there were no exigent circumstances justifying the warrantless the seizure of blood, which requires an invasion of the defendant's closed bodily systems. Although the court can envision circumstances in which such exigent circumstances permitting a blood draw might still exist despite the availability of the breath test and the defendant's willingness to take it, the record in this case does not support such a finding. Accordingly, the motion to suppress must be granted.

The United States Supreme Court in Schmerber made it clear that the integrity of an individual's person is a cherished value of our society. 384 U.S. at 772. This notion was affirmed by the Wisconsin Supreme Court in State v. Zielke, 137 Wis.2d 39, 54 (1987). These courts also cautioned that the constitutional foundation for warrantless chemical evidence searches could give way if the police refused to respect a reasonable request to undergo a different type of testing. Schmerber, supra at 760, n. 4, and Zielke, supra at 54-55. In State v. Bohling, 173 Wis.2d 259 (1993), the Supreme Court upheld a warrantless blood draw under the exigent circumstances exception, but in a situation in which the defendant refused to take an intoxilyzer test. Bohling at 534.

Although the defendant appears to argue that exigent circumstances justifying a warrantless blood draw can never exist where breath testing is available and the defendant has not refused such a test, this court does not go that far in this decision. Instead, a balancing of competing interests must occur on a case by case basis to weigh the defendant's Fourth Amendment interests in the integrity of his or her person against the legitimate interests of the public in enforcing the drunk driving laws. See State v. Guzman, 161 Wis.2d 80, 88 (Ct. App. 1991) aff'd 166 Wis.2d 577 (1992), cert. denied 504 U.S. 978 (1992) (what is reasonable depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself).

This balancing approach is suggested by the United States Supreme Court in the Schmerber decision, supra at 771, and by our Court of Appeals in State v. Krause, 168 Wis.2d 578 (Ct. App. 1992). See also Skinner v. Railway

Labor Exec. Ass'n, 489 U.S. 602, 619 (1989). In Krause, which considered the issue of whether forcible extraction of a blood sample was reasonable under the Fourth Amendment when the defendant refused the test under the Implied Consent law, the following factors were listed for consideration in affirming the denial of suppression:

> 1. Was the blood draw accomplished by medical personnel in a proper setting according to accepted medical standards;
>
> 2. What was the severity of the crime at issue;
>
> 3. Did the suspect pose an immediate threat to the safety of the officers or others;
>
> 4. Whether the defendant actively resisted;
>
> 5. Did the police refuse the defendant's reasonable request for an alternate test; and
>
> 6. What was the authority's need for the blood sample to prove its case.

Krause at 589-90.

The availability of breath testing capability is simply another factor relating to the exigencies necessitating a blood draw under all of the circumstances, and hence must be considered when balancing the competing interests, and determining the reasonableness of the resulting warrantless search. That is, the need for obtaining chemical evidence via a blood test might be more or less intense depending upon

whether or not various other techniques or instruments for obtaining such evidence are available, with the resulting reasonableness of the use of one technique over another depending upon all of the factors listed above, and perhaps others as well.

Without deciding the issue, the following additional factors are examples of circumstances which might in a given case weigh in the balance in determining the reasonableness of a warrantless blood draw even when breath testing is available, the provisions of section 885.235(1), Wis. Stats., notwithstanding:

> 1. Time is so critical a factor that the 20 minute observation period or the possibility that a defendant won't cooperate in providing a sufficient breath sample, resulting in lost time before a blood test is obtained; justifies requiring a blood sample in the first instance; and
>
> 2. The practical observation that fact-finders do not accept breath test evidence as readily as blood test evidence in spite of the statutory equality.

However, none of these possible factors, or others which might be relevant, were developed in this record.

A careful review of this record reveals no sufficient basis to require the blood test under the Fourth Amendment. In other words, in balancing the competing interests in this case between the State and the defendant, little weighs in the State's favor to offset the defendant's interests in bodily integrity and privacy. The only factors which can be seen in

the State's favor are that this is a criminal charge arising out of a one-car accident, that the defendant submitted to the test without resistance, and that the sample was taken under hospital conditions by medical personnel. While a closer case on balance than County of Richland v. Walter J. Metz, IV, Case No.s 98 TR 207 and 273, decided by this court on this same day, it is the opinion of this court that, absent some additional need or justification for requiring the bodily intrusion even a clinical blood draw entails, and absent any explanation as to why a breath test was not sufficient, the balance cannot be struck in the State's favor. While it might not take much further justification, some articulated basis in policy or in the facts of the particular case at bar is necessary.

For the reasons set out above, the State has failed to carry its burden to justify the warrantless blood draw under the Fourth Amendment, and the amended motion to suppress must be granted.

Counsel for the defendant is instructed to prepare an appropriate order. The matter will be put on the calendar for status at which time the parties will indicate whether the case shall be tried or disposed of short of trial.

BY THE COURT:

/s/_____
Edward E. Leineweber,
Circuit Judge 5/17/99

APPENDIX D

STIPULATION OF FACTS

1. Shortly following his arrest, the defendant was required by the arresting officer to provide a blood sample for evidentiary analysis. The officer required this sample to be provided by invoking the provisions of Wis. Stat. § 343.305, the Wisconsin Implied Consent law, and informing the defendant that he was legally required to submit to the taking of that sample or suffer penalty, through the reading to him of the standard form Informing the Accused form issued by the Wisconsin Department of Transportation for law enforcement use, and which set out the provisions of Wis. Stat. secs., 343.305(4) and (4m).

2. The defendant, so informed, submitted to the taking from him of a blood sample, as required by the officer. The sample was seized while the defendant was at the Richland Hospital in Richland Center, where the defendant had been taken by the officer, and at which location he had been informed that the officer was requiring him to provide a blood sample.

3. The defendant submitted to the seizure from him of blood samples under the legal compulsion, described above, which compulsion was a product of the operation of Wis. Stat. sec. 343.305, the Implied Consent Law, and which compulsion existed as a consequence of the threat that defendant's constitutionally protected property interest in his operating privilege would be taken away by the State were he

not to submit to the seizure of blood samples from him at the instance and direction of the police officer.

4. At the time of these seizures of blood from the defendant, the arresting police agency, the Richland County Sheriff's office, had available to it an Intoxilyzer 5000 device which was capable of testing samples of defendant's breath for alcohol concentration. The Intoxilyzer 5000 available to the Richland County Sheriff's officer was, at the time of the seizure of blood samples from the defendant, approved and certified for use as required by Trans. 311, WIS. ADM. CODE, and was in proper working order. Moreover, the Richland County Sheriff's officer had, at that time, available to it and in its employ, persons who were certified in the use of the Intoxilyzer 5000, pursuant to the provisions of Trans. 311.

5. Under Wis. Stat. sec. 885.235, the results of any breath samples tested by the said Intoxilyzer 5000 device would have been entitled, as a matter of statute law, to the same evidentiary weight as a test of blood samples done under optimum, i.e. statutory, conditions. See: Wis. Stat. sec. 343.305(6). Furthermore, the results of such Intoxilyzer test would, under applicable Wisconsin case law, have been "automatically admissible" in evidence.

APPENDIX E

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INFORMING THE ACCUSED FORM

Appendix C

INFORMING THE ACCUSED

Wisconsin Department of Transportation

SP4187 894 s.343.305(4) Wis. Stats.

When a Law Enforcement Officer requests that you submit to a chemical test, pursuant to Wisconsin's Implied Consent Law, the officer is required to inform you of the following:

Section A
(applies to everyone)

1. You are deemed under Wisconsin's Implied Consent Law to have consented to chemical testing of your breath, blood or urine at this Law Enforcement Agency's expense. The purpose of testing is to determine the presence or quantity of alcohol or other drugs in your blood or breath.

2. If you refuse to submit to any such tests, your operating privilege will be revoked.

3. After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense.

4. If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed.

5. If you have a prohibited alcohol concentration or you refuse to submit to chemical testing and you have two or more prior suspensions, revocations or convictions within a 10 year period and after January 1, 1988, which would be counted under s.343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

Section B
(applies to Commercial Motor Vehicle Operators/Drivers and Commercial Driver License Holders)

In addition to the information in Section A, if you were driving, operating, or on duty time with respect to a Commercial Motor Vehicle, paragraphs 6, 7 and 8 below also apply:

6. If you refuse to submit to any chemical tests, and you were driving or operating or on duty time with respect to a commercial motor vehicle, you will be issued an out-of-service order for the 24 hours following your refusal in addition to other penalties which may be imposed.

7. If you were driving or operating a commercial motor vehicle or on duty time with respect to a commercial motor vehicle, you take one or more chemical tests and the result of any test indicates an alcohol concentration in excess of 0.0, you will be subject to penalties and to a 24 hour out-of-service order which disqualifies you from operating a commercial motor vehicle for the 24 hour period following the test.

8. If you were driving or operating a commercial motor vehicle, you take one or more chemical tests and the result of any test indicates an alcohol concentration of 0.04 or more, upon conviction of such offense you will be subject to penalties and disqualified from operating a commercial motor vehicle.

Will you submit to an evidentiary chemical test of your Blood (breath, blood, urine)? ☒ Yes ☐ No

I certify that I have read Section A, and if checked here ☒ Section B, to John C Thorstad.

who has been arrested for a violation of 346.63 (1) (a), and have provided (him/her) a copy

of this form. (He/She) was identified by A Wisconsin Drivers License.

09-28-97 0300 AM
(Date and Time Signed) A.M./P.M.

Richland S.O.
(Agency)

x Sgt James J Bindl
(Law Enforcement Officer)

PERSON REQUESTED TO SUBMIT TO TEST

BEST AVAILABLE COPY